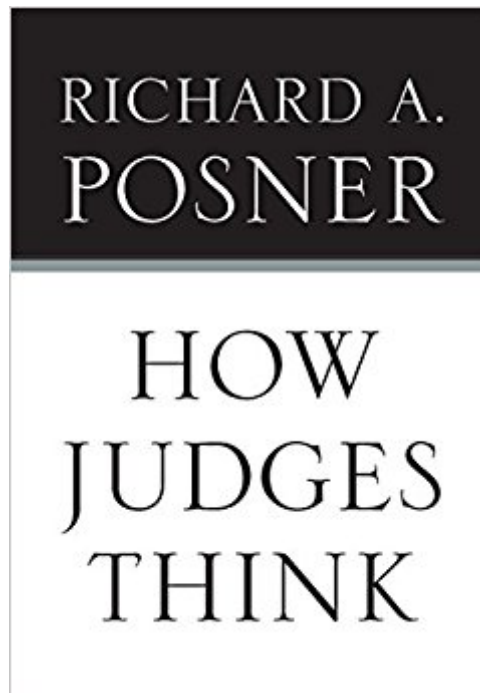




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# How Judges Think (Pims - Polity Immigration And Society Series)



## Synopsis

A distinguished and experienced appellate court judge, Posner offers in this new book a unique and, to orthodox legal thinkers, a startling perspective on how judges and justices decide cases.

## Book Information

File Size: 1627 KB

Print Length: 398 pages

Publisher: Harvard University Press; Reprint edition (May 1, 2010)

Publication Date: May 1, 2010

Sold by: Amazon Digital Services LLC

Language: English

ASIN: B00LTMDKMS

Text-to-Speech: Enabled

X-Ray: Not Enabled

Word Wise: Enabled

Lending: Not Enabled

Screen Reader: Supported

Enhanced Typesetting: Enabled

Best Sellers Rank: #109,142 Paid in Kindle Store (See Top 100 Paid in Kindle Store) #10

in Kindle Store > Kindle eBooks > Law > Procedures & Litigation > Courts #14 in Kindle

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## Customer Reviews

Posner is pretty much the Go-To Guy in legal studies today. You may disagree with his conclusions but he won't bore you (he's a forceful writer), you won't find it hard to follow him (he writes clearly), and you won't wonder whether he has a hidden agenda (he is open and forthright in stating his sources, as well as any reservations he has about his own conclusions drawn from them). He's academic (well documented and well reasoned) but not overly academic: his observations are always rooted in experience, for he is both an eminent teacher of jurisprudence at the University of Chicago and an acting federal circuit court judge, with years of practice on the bench. His books are not easy reads as he explores complicated issues and doesn't

simplify them. But you will never get lost in them, because he is an exceptionally articulate explainer. Years ago, when I was a history professor at a small women's college in the east, I taught a course on historical method, and it was writers (thinkers) (scholars) like Posner I wanted to introduce to my students, not that he writes like historians do but that he writes forcefully, sparingly, lucidly and compellingly, and persuasion is just as important a part of any scholar's business as explication. This is the third book by Posner that I have read. All three books were good. Two – including this one – are superb, models of engaged scholarship. (If you haven't read anything by him before, I recommend you start with *Reflections on Judging*, 2013.) Posner is. Arguing against legalism and various forms of moralism, Posner argues for a restrained pragmatic approach to the law, in line with his models on the bench, especially Holmes ("The life of the law has not been logic; it has been experience"), who accepted that the written law only went so far and that beyond that point, the prudent judge crossed from enforcing pre-existing, stringent rules to making new law. Law in action is imprecise but not amorphous. "In our system the law as it is enforced in courts is created by judges, using legal propositions as raw materials." He does not argue that a judge can make any law he wants. Rather, he argues that in any but the most constrained case, the judge must choose among courses of action that are not automatically (because the law tells the judge exactly what to do) clean -- or should I say clear? From this simple premise that judges are de facto legislators, Posner moves to a critique of many, maybe most academic commentators on the law, and a scathing critique of what is taught in even the best law schools in our country. He has, in other books, harsh words to say about Justice Scalia's supposed originalism, which he finds inadequate and self-deceiving – even Scalia admitted that he moved beyond it at times. If I were a lawyer, I would read this book NOW.

In this erudite and highly readable book, a distinguished judge and scholar provides the reader with remarkable insights into how judges think, or ought to think, when interpreting and creating the law. Judge Posner rejects sterile legalist theories in favor of a pragmatic approach to judicial decision-making, heavily influenced by economic theory. Drawing on insights from psychology, American legal history, and economics, Judge Posner argues persuasively that judges are not rule-bound adjudicating machines mechanically applying the law; rather judges creatively engage the real world by balancing competing interests, weighing consequences, and applying cost/benefit analyses when interpreting the law. In the process, judges, at least in the unique American judicial

system, inevitably act as legislators and, yes, as human beings, they are influenced by life experiences, political beliefs, and psychological make-up. The result is a highly sophisticated and nuanced discussion of how judges think, or at least how they should think. This book is written in a lively style, with humor, wit, and a great deal of wisdom, including some very practical advice regarding how attorneys should frame their arguments when they appear in court. (Hint: instead of focusing on words; focus on the real world consequences of your arguments).

I found this to be a very significant volume by Judge Posner, since he is writing on several of his strongest areas--legal philosophy, American judges, and theories of judicial decision-making. As the title indicates, this is an enormous topic and even to cover all of Posner's topics in a brief review is impossible. But this is what he is up to: First, he wants to review existing explanatory theories of judicial behavior: the attitudinal; sociological; economic; organizational; pragmatic; legalistic; and policy choice. Posner here seeks to demonstrate that no one of these theories can wholly explain judicial behavior, and that some other approach he suggests is better suited to do the job. Posner is quite a creative fellow, extremely well versed in a variety of literatures in addition to the legal. For example, he discusses judges as workers in the judicial system, quite an innovative approach. Next he focuses on judges as "occasional legislators" and what ideology a legislating judge employs. Unconscious preconceptions and intuitions are major topics in this discussion. Posner then shifts to what external and internal constraints limit judicial freedom of decisional action, including precedent, tenure and salary issues, and internal constraints (what we political scientists refer to as "role theory" and small group analysis). Along the way he takes some effective potshots at folks such as Lloyd Weinreb (who argues analogy as the key to legal analysis), the legal process school, "neutral principles" and the Scalia approach to constitutional interpretation. Interestingly enough, law professors are not a major constraint, because they have segregated themselves out of studying and interacting with judges. This is one of the most perceptive chapters in the book. By chapter 9, Posner is zeroing in on one of his favorite topics--pragmatic adjudication. He argues that pragmatic policy concerns often are the best device for explaining judicial actions because Posner believes these considerations should guide judges. Of course, Judge Posner has written literally reams on this topic, but I found this one of his best discussions. Finally, Posner targets the Supreme Court, "a political court" as he terms it. The limited impact the Court has in policing the Courts of Appeals constitutes an interesting theme here. Posner follows this up with a fine review of Justice Breyer's "Active Liberty" and a fascinating discussion of what he terms "judicial cosmopolitanism," or how much foreign legal concepts should play a role in American judicial decision making. This chapter

includes highly critical discussions of Beatty's "Ultimate Rule of Law" and Israeli CJ Aharon Barak's "The Judge in a Democracy." Posner can throw critical right jabs with the best of them. This is a very long book (at around 377 pages). But is it packed with thought stimulating material and arguments, as well as exceptionally useful bibliographic references in the notes (which are actually at the foot of each page). Anyone interested in American judges and what they do, and why they do it, would consider this volume as essential reading.

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